Supreme Court, U.S.
FILED

No. 991746 MAY 1 - 2000

OFFICE OF THE CLERK

In the Supreme Court of the United States

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

versus

HERBERT ANDERSON,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE LOUISIANA SUPREME COURT

APPENDIX TO PETITION FOR CERTIORARI OF WATERMAN STEAMSHIP CORPORATION

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APPENDIX

1. February 18, 2000 Louisiana Supreme court opinion sought to be reviewed

2. December 17, 1999 ruling by the Louisiana Court of Appeals for the Fourth Circuit

3. October 12, 1999 order of the Civil District Court, Parish of Orleans

4. July 9, 1999 Reply to Opposition to Exception of No Right of Action or No Cause of Action, with alternative Motion for Summary Judgment

5. December 2, 1998 Affidavit of Peter M. Johnston

6. April 30, 1997 Petition for Damages

APPENDIX 1

The Supreme Court of the State of Louisiana

HERBERT ANDERSON

VS. NO. 1999-CC-3613

WATERMAN STEAMSHIP CORPORATION

- - - - - -

IN RE: Waterman Steamship Corporation; - Defendant; Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. F, Nos. 97-7697; to the Court of Appeal, Fourth Circuit, No. 99-C-2866

- - - - - -

February 18, 2000

Denied.

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J., not on panel.

Supreme Court of Louisiana
February 18, 2000

/S/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX 2

NO. 99-C-2866
COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

HERBERT ANDERSON

versus

WATERMAN STEAMSHIP CORPORATION

In Re: WATERMAN STEAMSHIP CORPORATION
Applying for: SUPERVISORY WRIT
Directed to: HONORABLE YADA MAGEE, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS DIVISION "F", 97-07697

WRIT DENIED

We find *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989) to be dispositive in this matter and thus affirm the trial court. *Williams* states that a Jones Act negligence claim may be brought against a privately owned and operated vessel that is time-chartered to the United States. Therefore, we deny the writ in regards to Plaintiff's claim under the Jones Act.

These facts differ from *Williams* in that Plaintiff also asserts maintenance and cure and unseaworthiness claims, which give rise to *in rem* liability.[1]

A cursory reading of 46 U.S.C. 741 seems to imply

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[1] *The Osceola*, 189 U.S. 158 (1903).

that claims of maintenance and cure and unseaworthiness may not be brought against the Major Stephen Pless because it is "operated by or for the United States" and such ships cannot be "subject to arrest or seizure by judicial process." Nevertheless, the rationale of Section 741[2] is that the United States is made liable in personam via Section 742.

In this case factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty. For these reasons we deny the writ as concerns Plaintiffs claims of maintenance and cure and unseaworthiness.

New Orleans, Louisiana this 17th day of December, 1999.

s/s MEK

JUDGE MICHAEL E. KIRBY

s/s RJK

CHIEF JUDGE ROBERT J. PLESS

s/sRAB

JUDGE ROBERT A. KATZ

DEC 1 7 1999

[2] The exact language is: "in view of the provision herein made for a libel in personam." This language refers to Section 742.

APPENDIX 3

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION:"F"' (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts;*

the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court issues the following Reasons for Judgment:

On May 1, 1996, Plaintiff, Herbert Anderson, (hereinafter referred to as "Plaintiff"), was employed by Waterman Steamship Corporation, (hereinafter referred to as "Defendant"), as a Seaman and Assistant Cook Utility of the crew. Plaintiff was permanently assigned to a vessel in navigation which Plaintiff contends was being operated by his employer Defendant Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Plaintiff was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Plaintiff alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Plaintiff Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Plaintiff alleges that he sustained injuries as a result of this accident. Plaintiff further alleges that he does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

In Plaintiff's *Petition for Damages* filed in this matter he has alleged that he has a right of action against

Waterman, his employer, under both the general maritime law as well as in his capacity as a seaman. Plaintiff is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure.

1. PLAINTIFF'S RIGHT OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

Defendant alleged in its Exception that "....by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 USC §§ 741-745, Herbert Anderson has no cause of action and/or no right of action against Waterman Steamship Corporation. " (Defendant's Exception of No Right of Action or No Cause of Action, p.1). Defendant in its Memorandum in support of the exceptions contended that Plaintiff "....has no cause of action and no right of action against Waterman Steamship Corporation, since his exclusive remedy is against the United States." (Defendant's Memorandum in Support of Exception of No Right of Action or No Cause of Action, p. 1).

However, for the reasons to be discussed in the next section, the Court determines that Plaintiff does have a cause of action and a right of action against his employer Waterman Steamship Corporation for the injuries he alleges he suffered while working aboard the S.S. MAJOR STEPHEN W. PLESS.

The Louisiana Fourth Circuit Court of Appeal recently discussed the exception of no cause of action in *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006. In *Dragon, supra*, the Fourth Circuit stated that:

The purpose of an exception of no cause of action is to determine the sufficiency in the law of the petition. The exception is triable on the face of the papers and for the purposes of determining the issues raised b the exception, the well pleaded facts in the petition must be regarded as true. *City of New Orleans v. Board of Com'rs,* 93-0690 (La. 7/5/94), 640 So.2d 237, 241. The standard for granting an exception of no cause of action is as follows:

The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor. in deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and the (supreme) court should subject the case to de novo review because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition.

In appraising the sufficiency of the petition we follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. The petition should not be dismissed merely because plaintiff's allegations do not support the legal theory he

intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on any possible theory.

640 So.2d at 253 (citations omitted).

Id. at 98-1375, at pp. 2-3; 726 So.2d at 1007-1008.

In *Jefferson Downs Corp., Inc. v. Louisiana State Racing Commission*, 98-1229, 98-1230, 98-1231, (La. App. 4th Cir. 1/13/99), 727 So.2d 644, the Louisiana Fourth Circuit discussed the exceptions of no cause of action and no right of action. In *Jefferson Downs, supra*, the Court held that:

Exception of no cause of action

Although the procedural history and issues are complicated in this case, the fact remains that the only effect of Commission's rulings are to issue documents allowing Evangeline Downs to cause a referendum election in St. Landry Parish. However, review of the pleadings, in light of the applicable Louisiana state law, reveals that the trial court correctly dismissed the petition for judicial review on the exception of no cause of action.

The applicable law on this issue has recently been summarized by the Louisiana Supreme Court in *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission*, 94-2015 (La. 11/30/94), 646 So.2d 885, a case cited by Livingston Downs, as follows:

> An action can only be brought by a person having a real and actual interest which he asserts. La. Code Civ. Proc. Art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. Art. 927 (5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Bernie-Bailey Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation....

Id. at 98-1229, 98-1230, 98-1231, p. 6; 727 So.2d at 646-647. (Citation omitted).

The Court finds that from the allegations in Plaintiffs *Petition* filed into the record in this matter, as well as the applicable law on this issue, that Herbert Anderson has a real and actual interest in this action. He fits within the class of persons to whom the law grants the causes of action asserted in his *Petition for Damages*. Thus, Defendant Waterman Steamship Corporation's Exception of No Right of Action is overruled.

11. PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

The initial inquiry is what law governs in a maritime personal injury case such as the one at bar. The Louisiana Supreme Court in *Prejean v. Industrial Cleanup, Inc., et al,* 98-0948 (La 12/l/98), 721 So.2d 1273, stated that: "....State courts must apply the same law to a maritime claim that a federal court would apply had the case been filed in federal court. 1 *Benedict on Admiralty* (MB) § 112 (7th ed. 1998)". *Id.* at 98-0948 at p. 9; 721 So.2d at 1278.

In *Dragon v. Cooper T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006, cited earlier in these Reasons for Judgment, the Louisiana Fourth Circuit Court of Appeal stated that:

> State courts exercising maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89, 94....

Id. at 98-1375 at p. 7; 726 So.2d at 1009.

In *Holmes v. Daybrook Fisheries, Inc.*, 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, writ application *pending*, 99-C-1571 (filed June 1, 1999), the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state

> court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824 at pp. 2-3; 730 So.2d at 1008, (Citation omitted).

The United States Fifth Circuit Court of Appeal discussed the very issue raised by Defendant in their no cause of action exception, in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied*, 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990). [1] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for

1 The Louisiana Supreme Court in *Vendetto vs. Sonat Offshore Drilling Co.*, 97-3103 (La. 1/20/99); 725 So.2d 474, *rehearing denied*, __ So.2d __, 97-3103 (La. 2/12/99), *U.S. cert den.* __ U.S. __, 119 S.Ct. 2369, 2370 (1999), discussed by Plaintiff in his memorandum, when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. Thus, while technically this state court may not be bound by federal Fifth Circuit law, the Court finds that the Fifth Circuit's reasoning is persuasive authority for this Louisiana state court, and thus adopts it.

summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.

Id. at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra*, in pertinent part provides as follows:

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:

46 U.S.C.A. § 745 (West 1975).

In *Williams, supra*, the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams*, and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams*, next extensively discussed the Suits in Admiralty Act. In *Williams, supra*, the Court discussed this issue as follows:

IV. THE SUITS IN ADMIRALTY ACT

> The exclusivity provision may bar the appellant's suit against Central Gulf where a remedy (against the United States) is provided by (the Suits in Admiralty Act.)" 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman*, 693 F.2d at 444. In light of Trautman, we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the

Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by (the Suits in Admiralty Act)" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational con-

trol, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989)(quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981)). *See also M.J. Norris, The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this pro-

vision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for costs "in and of itself does not transfer operational responsibility from the owner." *Mallard*, 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

The Court finds the reasoning in *Williams, supra*, to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the

Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personal and Provisioning, Inc.*, 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.*, 54 F.3d 203, 208 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996). *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: Pineiro v. United States, 65 F. Supp. 191 (Dist. Ct., N. D. Cal, S. D. 1945); *Burkholder v. United States,* 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States*, 86 F. Supp. 740 (U.S.D.C., S.D.N.Y. 1949); and *Western Tankers Corporation v. United States*, 1975 AMC 775 (U.S.D.C., S.D, N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern 64 operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is

who was in charge of the day to day operations of the vessel where the plaintiff was injured.

The Court further finds that based on Plaintiff's exhibits, that in the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985.

The Court finds that in considering the arguments of Plaintiff, he has demonstrated through his pleadings, his memorandums and the exhibits attached thereto, as well as his Petition for Damages, Statement of Contested Material Facts, and all other pleadings and exhibits on.file in the record of this matter, that he has set forth specific facts showing that Plaintiff has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of the Suits in Admiralty Act, and thus, Defendant's Exception of No Cause of Action is overruled.

III. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS MATTER.

As stated earlier, the Court adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is "operational control". That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admi-

ralty claims, such as unseaworthiness and claims for maintenance and cure.

For the purposes of Defendant's motion for summary judgment, it is significant that the federal Fifth Circuit in *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C.§ 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the clearly erroneous standard as announced in *McAllister, supra.*

Id. at 445, (emphasis added).[2]

The Louisiana Fourth Circuit Court of Appeal recently discussed the standard for evaluating summary judgments in *Davis v. Bd. Of Supervisors of La. State University et al*, 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied*, 98-C-1329 (La. 6/26/98), 719 So.2d 1288. In *Davis supra*, the Fourth Circuit held that:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion requires him only to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

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2 Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessells in the Suez Canal. *Id.* at 442.

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Townley v. City of Iowa,* 97-493 (La. App. 3 Cir. 10/29/97); 702 So.2d 323, 326.

The amended article 966 substantially changes the law of summary judgment. Under the prior jurisprudence, summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting summary judgment, and in favor of trial on the merits. *Sassone v. Elder,* 626 So.2d 345 (La. 1993). The jurisprudential presumption against granting the summary judgment was legislatively overruled by La. C.C.P. art. 966 as amended. The supporting documentation submitted by the parties is to scrutinized equally and the overriding presumption in favor of trial has been deleted. Once the motion for summary judgment has been properly supported by the mover, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. The amendment to La. C.C.P. art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c)....

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In construing the federal summary judgment

> rule, the United States Supreme Court held that summary judgment shall be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986). If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. *Id.* The *Anderson* court further held that the mere existence of a scintilla of evidence on the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for that party....
>
> *Id.* at 97-0382 at pp. 7-9; 709 So.2d at 1033-34. (String citations omitted).

The Louisiana Fifth Circuit Court of Appeal recently discussed what constitutes a "material fact". In *Azreme, Corp. v. Esquire Title Corp.*, 98-1179 (La. App. 5th Cir. 3/30/99), 731 So.2d 422, the Fifth Circuit stated that:

> .... The amended version of LSA-C.C.P. art. 966 now proclaims that the summary judgment procedure is favored and shall be construed to accomplish the ends of just, speedy, and inexpensive determination of allowable actions. *Tonubbee v. River Parishes Guide,* 97-440 (La. App. 5th Cir. 10/28/97), 702 So, 2d 971. The plaintiff filed the summary judgment motion in this case. Under the amended version of LSA-C.C.P. art. 966, the burden of proof remains on the mover to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." *Id.* at 974. A material

> fact is one that would matter on the trial of the merits. *J.W. Rombach, Inc. v. Parish of Jefferson*, 95-829 (La. App. 5th Cir. 2/14/96), 670 So.2d 1305. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. *Id.* at 1308.
>
> ****
>
> ....If the supporting documents produced by the mover are sufficient to resolve all material fact issues, then the burden of proof shifts to the opposing party to present evidence that material facts are still in dispute. *Herman v. Rome*, 95-666 (La. .App. 5th Cir, 1/17/96), 668 So.2d 1202. If the supporting documents are not sufficient to resolve all material fact issues, summary judgment must be denied. *Id.*

Id, at 98-1179, at pp. 5-6; 731 So.2d at 425, (emphasis added).

The Court adopts Plaintiff's argument that there are disputed issues of material fact and law as to the following, such that summary judgment is inappropriate in this matter:

1. There are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate.

2. There are disputed issues of material fact as to whether or not the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Defendant Waterman Steamship Corporation, such that summary judgment is inappropriate.

3. There are disputed issues of material fact as to whether or

not the intent of the parties is to place Defendant Waterman with responsibility for its employees and for any personal injuries which Waterman employees sustain while carrying out their duties, such that summary judgment is inappropriate.

4. There are disputed issues of material fact and law as to whether or not the United States has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Plaintiff Herbert Anderson such that summary judgment is inappropriate.

5. There are disputed issues of material fact and law as to whether or not the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Plaintiff Herbert Anderson, such that summary judgment is inappropriate.

6. There are disputed issues of material fact and law as to whether or not the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, constitutes the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Plaintiff's personal injuries from his employer Waterman to the United States. Thus, summary judgment is inappropriate.

CONCLUSION

For the reasons discussed in these Reasons for Judgment, the Court makes the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied,

REASONS FOR JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 7 DAY OF Oct. 1999, AT NEW ORLEANS, LOUISIANA.

/s/ illegible
JUDGE

A True Copy
s/s ilegible
Deputy Clerk

APPENDIX 4

46603/JRF/lmr 0032-5573

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 97-07697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

REPLY TO OPPOSITION TO WATERMAN STEAMSHIP CORPORATION'S EXCEPTION OF NO RIGHT OF ACTION OR NO CAUSE OF ACTION, AND ALTERNATIVE PRAYER FOR RELIEF UNDER LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 966

NOW INTO COURT, through undersigned counsel, comes Waterman Steamship Corporation, and hereby replies to Herbert Anderson's opposition to Waterman's Exception of No Right of Action or No Cause of Action, and prays for

alternative relief under Louisiana Code of Civil Procedure article 966.[1]

THE SUITS IN ADMIRALTY ACT SUBSTITUTES AN *IN PERSONAM* REMEDY AGAINST THE UNITED STATES FOR CLAIMS THAT COULD GIVE RISE TO *IN REM* LIABILITY OF VESSELS BEING OPERATED FOR OR ON BEHALF OF THE UNITED STATES

Herbert Anderson devotes virtually his entire brief to an analysis of whether the government could be subjected to liability as a purported time-charterer for what plaintiff contends to have been Jones Act negligence that led to his injury. Plaintiff has failed, however, to analyze the second basis by which the Suits in Admiralty Act can be triggered, namely, by his assertion of claims that can give rise to *in rem liability* on the part of the S/S MAJ. STEPHEN W. PLESS, a vessel operated for or on behalf of the United States of America. Plaintiff's Suits in Admiralty Act analysis is therefore shallow and incomplete. Once application of the Suits

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[1] Plaintiff has objected to documentary evidence having been attached to the Exception of No Cause of Action. Accordingly, Waterman Steamship Corporation prays for and is entitled to relief under Louisiana Code of Civil article 966 as an alternative basis for dismissal of the plaintiff's petition for damages. Summary judgment is appropriate in this case for the same reasons as set forth in the Memorandum in Support of the Exception of No Right of Action or No Cause of Action, and as set forth in this reply memorandum. There are no genuine issues as to any material facts, and Waterman is entitled to judgment as a matter of law because liability for plaintiff's accident rests exclusively with the United States Government pursuant to the Suits in Admiralty Act. Waterman hereby formally amends its Exception of no Right of Action or No Cause of Action by moving for alternative relief of summary judgment.

in Admiralty Act is triggered, liability of the United States is exclusive and in place of all other liability, including that of the operator of the vessel. 46 USC §745.

Plaintiff has asserted claims not only for alleged Jones Act negligence, but also for alleged unseaworthiness and for maintenance and cure. Jones Act claims do not give rise to *in rem* liability. *Plamals v. Pinar del Rio*, 277 U.S. 151 (1928). Claims for unseaworthiness and maintenance and cure, on the other hand, trigger potential *in rem* liability on the part of the vessel upon which the injury occurred. *The Osceola*, 189 U.S. 158 (1903).

At a later section of this brief, Waterman analyzes the degree of control that the United States exercised over the S/S MAJ. STEPHEN W. PLESS and shows that the degree of control was sufficient to render the United States, as charterer, liable for the alleged negligence of the crew of the S/S MAJ. STEPHEN W. PLESS. At this section of the brief, however, Waterman shows that the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered by the plaintiff asserting claims that give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS.

Claims arising on vessels operated for the United States are subject to the Suits in Admiralty Act.

Section 741 of the Suits in Admiralty Act, 46 USC §741, applies to claims arising on board vessels that are owned by or operated for the United States of America: "No vessel owned by the United States... or operated by or for the United States... shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure... " 46

USC §741. (Emphasis added.) Privately owned vessels that have been time chartered to the United States and are being operated for the United States thus fall within the ambit of Section 741 just as do vessels that are owned by the United States. indeed, the Suits in Admiralty Act was adopted shortly after the end of World War I in order to overcome the inconvience and embarrassment of merchant vessels operated for the United States being subjected to arrest and attachment. See, Legislative history to the Suits in Admiralty Act, 66th Congress,1st Session, Senate Report No. 223 (September 27, 1919).

The Suits in Admiraltv Act has been construed by numerous courts as applying both to vessels owned by as well as those operated for the United States under time charter party arrangements. For example, in *Western Tankers Corp. v. USA,* 1975 AMC 775, 780 n. 10 (S.D. NY 1975), the court held that claims for unseaworthiness occurring aboard a vessel time chartered to the government were cognizable under the Suits in Admiralty Act: "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 USC section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner. " Likewise, in *Burkholder v. United States,* 60 F. Supp. 700 (E.D. Penn. 1945) ("*Burkholder II*"), the court held that the Suits in Admiralty Act applies to claims occurring aboard vessels time chartered to the United States:

> "If the general purpose of the Suits in Admiralty Act be considered no reason is apparent to place ships time chartered by the United States outside its scope.

> The law was enacted 'for the purpose of relieving the United States from obstruction of its commercial traffic by seizure of merchant vessels owned by it or under its control...' *Kunglig Jarnvagsstyrelsen v. United States*, 2 Cir., 19 F.2d 761, 762. Vessels time chartered by the United States are instruments of the government's commercial traffic and, in respect of obstruction of such traffic, no distinction can be drawn between the inconvenience arising from the seizure of such vessels and the seizure of those owned by the United States or operated for it under agency agreements."

Burkholder II, 60 F.Supp. at 703.

The Suits in Admiralty Act was held to apply to claims arising out of conditions aboard a vessel time chartered to the government in *Peneiro v. United States*, 65 F.Supp. 191, 192 (N.D. Cal. 1945) ("*Peneiro II*"). In that case, the court held that the Suits in Admiralty Act imposes liability *in personam* upon the United States based upon the unseaworthiness of the GLORIA, a vessel time chartered to the United States:

> "Both the Senate and House Committee reports upon the bill, which later became the Suits in Admiralty Act, clearly indicate that the Congressional purpose was not solely to immunize the united States from seizure of government owned merchant vessels, but as well to eliminate the embarrassment and handicap of in rem admiralty proceedings against merchant vessels employed in the service of the United States. See House Report No, 497, page 3 and Senate Report No. 223, pages 1-3, accompanying S.3076, 66th Cong. 2d Sess. "

Peneiro II, 65 F. Supp. at 193, See also, *Epstein v. U. S.*, 86 F. Supp, 740 (S. D. N. Y. 1949), holding that a privately owned vessel time chartered to the United States was "operated for the United States" within the meaning of the Suits in Admiralty Act, 46 USC §741.

The above analysis of the text of §741 of the Suits in Admiralty Act, its legislative history, and the jurisprudence construing the Act demonstrates that the Suits in Admiralty Act encompasses admiralty claims arising aboard vessels that have been time chartered to the United States. The statute substitutes an in *personam* claim against the United States for claims that could give rise to *in rem* liability of vessels operated for or time chartered to the United States.

Claims that give rise to in rem liability on the part of a vessel being operated for the United States trigger application of the exclusivity of liability provisions of the Suits in Admiralty Act.

As noted above, the Suits in Admiralty Act was adopted so as to avoid the embarrassment and inconvenience of merchant vessels operated on behalf of the United States from being subjected to arrest or attachment proceedings in admiralty. By focusing upon whether the United States would have in *personam* liability as a purported time charterer, Anderson has overlooked the potential *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS created by his unseaworthiness and maintenance and cure claims. The pendency of these claims automatically triggers application of the Suits in Admiralty Act, 46 USC §742, Under that provision, an in *personam* remedy against the United States is substituted for admiralty claims that could give rise to *in rem* liability on the part of a vessel being

operated for or time chartered to the United States. Thus, in order to determine whether the exclusivity of liability provisions of the Suits in Admiralty Act have been triggered, it is not necessary to determine whether the United States would have in *personam* liability based upon its neglegent operation or control of a vessel that has been chartered to it: the Suits in Admiralty Act applies when a claim has been asserted that could give rise to *in rem* liability on the part of a vessel being operated for or on behalf of the United States. Concepts of negligence or operational control are irrelevant where a plaintiff has asserted unseaworthiness or maintenance and cure claims against a vessel being operated for the United States:

> "Since the vessel was being operated by Western Tankers for the United States, as time charterer, and was carrying its oil, Perry could have sued the United States under the Suits in Admiralty Act, 46 U.S.C. section 741 et. seq., for his personal injuries due to the unseaworthiness of the vessel, even though she was manned, equipped and maintained by the owner. "

Western Tankers Corp. v. U.S.A., 1975 A.M.C. 775, 780 n. 10 (S.D. NY t975).

Another case holding claims for unseaworthiness that give rise to *in rem* liability of a vessel time chartered to the United States trigger application of the exclusivity of liability provisions of the Suits in Admiralty Act was *Burkholder v. United States,* 56 F.Supp. 106 (E.D. Penn. 1944) ("*Burkholder I*"). The admiralty court in *Burkholder I* held that an unseaworthiness claim that gives rise to *in rem* liability on the part of the vessel is transferred by virtue of

the Suits in Admiralty Act to an in personam claim against the United States:

> "Were this suit based upon the general law of maritime tort, the libelant would have a right in rem against the ship if his cause of action was the unseaworthiness of the vessel. *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. 1 do not question that, in such case his right of action would be transferred to the United States by the Suits in Admiralty Act.. "

Burkholder I, 56 F.Supp. at 109.

Yet another case holding that the Suits in Admiralty Act substitutes an in *personam* remedy against the United States for claims that could give rise to *in rem* liability on the part of a vessel time chartered to the United States is *Peneiro v. United States*, 65 F.Supp. 191 (N.D. Cal. 1945) ("*Peneiro II*"). The admiralty court in *Peneiro II* observed that in its first decision, *Peneiro I*, 62 F.Supp. 95 (N.D. Cal. 1945), the court had "expressly refrained from passing upon respondent's [the United States'] contention that the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C.A. section 741 et seq., does not impose liability in *personam* upon the United States based upon the unseaworthiness of a vessel time chartered to the United States, reserving decision on that question for the trial." Following the trial, the court issued its second opinion, *Peneiro II*, in which it held that the government assumes exclusive *in personam* liability by virtue of the Suits in Admiralty Act for unseaworthiness claims that arose aboard a vessel time chartered to the United States. In overruling the United States' exception, *Peneiro II* cited with approval to *Burkholder II*, 60 F.Supp. at 703, for the proposition that the Suits in Admiralty Act was designed to

substitute an *in personam* remedy against the United States for claims that could give rise to *in rem* liability.

Likewise, claims for maintenance and cure, that also are not rooted in concepts of negligence, and that, like claims of unseaworthiness, give rise to *in rem* liability, trigger the exclusivity of liability provisions of the Suits in Admiralty Act where the injury occurred aboard a vessel being operated for the United States:

> "The second cause of action [being asserted against the United States], for maintenance and cure, is maintainable. This right is a contractual right independent of the seaman's right to recover indemnity under the general maritime law or indemnity under the Jones Act. Since he would have had a right in rem against the ship prior to the passage of the Jones Act for maintenance, cure and wages, this cause of action will be transferred by the Suits in Admiralty Act to the United States.

Burkholder II, 60 F.Supp, 700, 702 (E.D. Penn., 1945).

Applying the above discussed law to the facts of this case reveals that the Suits in Admiralty Act has been triggered such that plaintiff has an in *personam* claim against the United States that is in lieu of any and all other claims he could have asserted against the Waterman Steamship Corporation. The S/S MAJ. STEPHEN W. PLESS was being operated for the Military Sealift Command, a part of the United States government. The vessel carried munitions, weapons, and other war materials. The United States has an interest in ensuring that such vessels are not arrested or subjected to attachment. The Suits in Admiralty Act substitutes

an *in personam* remedy against the United States for claims that Anderson may otherwise have had against Waterman Steamship Corporation, Pursuant to §745 of the Suits in Admiralty Act, 46 USC §745, "[Wlhere a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim..." In other words, by proving an *in personam* claim against the United States, the Suits in Admiralty Act mandates that such liability is exclusive such that Anderson is precluded from maintaining his claims against Waterman Steamship Corporation.

The availability of an *in personam* claim against the United States for the alleged unseaworthiness of the S/S MAJ. STEPHEN W. PLESS and for the plaintiff's maintenance and cure is not affected by the Fifth Circuit opinion discussed by plaintiff in his brief, *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5 th Cir. 1989). *Williams* did not create any new law; it merely reiterated legal principles that have governed claims brought by seamen injured aboard vessels operated for the United States subsequent to the 1919 enactment of the Suits in Admiralty Act. *Williams* merely observed that absent operational control, a time charterer is not liable for the negligence of an owner's employees. This principle was observed years earlier in *Burkholder I*, 56 F.Supp, 106, when the court noted that "[T]he charterer under a time charter is not liable to third persons for the torts of the owner or his agents... Certainly the Suits in Admiralty Act does not change the rule that the charterer under a time charter is not liable for the negligence of the owner's employees. That Act does not create new liabilities... The new remedy by libel *in personam* against the

United States which it gives lies only 'in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action.'" *Burkholder I*, 56 F. Supp. at 108.

Williams simply reiterates what had been held long ago in *Burkholder*, namely, that a time charterer who exercises no operational control is not liable for the negligence of the owner's employees.[2] *Williams* did not, however, alter the principle embodied in the Suits in Admiralty Act that an *in personam* remedy against the United States is substituted for claims that could give rise to in rem liability on the part of a vessel time chartered to or operated for the government. Indeed, there were no unseaworthiness or maintenance and cure claims at issue in *Williams*. The claims at issue in *Williams* sounded exclusively in negligence. 874 F.2d at 1059.

Since the plaintiff's claims in Williams were rooted exclusively in negligence theories, the Fifth Circuit analyzed the issue in terms of whether principles of maritime law would have allowed *Williams* to state a claim against a private person in the same position as the government, i.e. against a private time charterer. Finding that the United States exercised no operational control over the vessel, the Fifth Circuit held that *Williams* would have been unable to

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[2] The *Williams* rule is not followed by every court, and plaintiff concedes it is not binding on this Court. For example, without analyzing operational control, the Southern District of California held in a personal injury case involving a vessel time chartered to the United States, that "Plaintiff's exclusive remedy is against defendant, United States of America, pursuant to 46 USC §745." See, *Nakano v. United States and Vessel Charters, Inc.*, 1988 AMC 2220, 2221 (S.D. Cal. 1988).

state a claim against the United States as time charterer such that the Suits in Admiralty Act did not provide a remedy and §745's exclusivity provision therefore did not operate to bar suit against Central Gulf. The Fifth Circuit obviously did not have to consider the issue of whether unseaworthiness could have triggered in rem liability on the part of the S/S BAY, since Williams had asserted only Jones Act negligence claims that did not give rise to *in rem* liability. Williams therefore did not affect or alter the longstanding rule that the Suits in Admiralty Act substitutes an in personam remedy against the United States for claims that could give rise to in rem liability on the part of a vessel time chartered to or being operated for the United States.

Unlike Wilbert Williams, Herbert Anderson has elected to assert unseaworthiness and maintenance and cure claims that can give rise to *in rem* liability. Accordingly, this Court need not address the issue of whether the government exercised sufficient operational control over the S/S MAJ. STEPHEN W. PLESS so as to render it liable for negligence under the Jones Act, since Anderson's claims of unseaworthiness and maintenance and cure give rise to potential *in rem* liability on the part of the MAJ. STEPHEN W. PLESS, thereby automatically triggering application of the Suits in Admiralty Act that makes the United States exclusively liable in lieu of any claims against the operator of the vessel. Once the Suits in Admiralty Act is triggered, liability of the United States is exclusive in place of all claims arising out of the subject matter, 46 USC §745, such that Anderson's claims against Waterman Steamship Corporation are barred. Anderson must either proceed in federal court against the United States America, or not proceed at all. Waterman Steamship Corporation is shielded from liability by virtue of the exclusivity of liability provisions of §745 of the Suits in Admiralty Act.

THE UNITED STATES OF AMERICA EXERCISED SUFFICIENT OPERATIONAL CONTROL OVER THE S/S MAJ. STEPHEN W. PLESS AS TO RENDER IT EXCLUSIVELY LIABLE FOR ANDERSON'S CLAIMS

The above analysis demonstrates that the government is exclusively liable for Anderson's claims by virtue of the Suits in Admiralty Act because Anderson has alleged unseaworthiness and maintenance and cure claims that could give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS, a vessel being operated for the United States Military Sealift Command. The Suits in Admiralty Act substitutes an *in personam* claim against the United States for claims that could give rise to *in rem* liability on the part of a vessel being operated for the United States. Once the Suits in Admiralty Act is triggered, liability of the United States is exclusive in lieu of any claims against the operator of the vessel. Accordingly, it is not necessary to reach the issue of whether, if Anderson had brought purely negligence based theories, the United States would have been liable in personam as charterer of the S/S MAJ. STEPHEN W. PLESS.

Had the plaintiff asserted only a Jones Act negligence claim, and not also brought claims of unseaworthiness and maintenance and cure that automatically triggered application of the Suits in Admiralty Act, the analysis would focus upon whether the United States exercised operational control over the S/S MAJ. STEPHEN W. PLESS. The government did exercise operational control over the S/S MAJ. STEPHEN W. PLESS. Therefore, application of the Suits in Admiralty Act is triggered even if plaintiff had not also asserted unseaworthiness and maintenance and cure claims.

This case is therefore distinguishable from *Williams v. Central Gulf Lines*, 874 F.2d 1058 (5th Cir. 1989), in which case "operational control did not shift from Central Gulf to the United States" such that, under the facts of that case, "the appellant would have been unable to state a claim against the United States as time charterer." *Williams*, 874 F.2d at 1063. The Fifth Circuit observed that "the term 'control' as used by this court in formulating this general rule [that a time charterer who has no control over the vessel assumes no liability for negligence] refers to operational control of the vessel, not ultimate control of its destination or cargoes. " Williams, 874 F.2d at 1062.

In opposing the exceptions filed by Waterman, plaintiff has mischaracterized the nature of the government's control over the S/S MAJ. STEPHEN W. PLESS as being limited merely to directing "the destination of the vessel or the ultimate destination of the cargo..." Plaintiffs opposition memorandum at p. 19. In fact, the type of control exercised by the United States Military Sealift Command went far beyond that of a normal time charter arrangement wherein a party hires a vessel to transport cargo from one port to another. Unlike a typical time charterer that simply hires the vessel to transport cargo, the United States of America has been given the right to install on the S/S MAJ. STEPHEN W. PLESS any defensive armament... the government deems necessary." *See*, Affidavit of Peter M. Johnston at paragraph 6. Normal time charterers do not have the right to make structural modifications to the vessel being time chartered. This is an element of control that distinguishes the relationship between the United States of America and Waterman from that between a typical time charterer and a vessel owner.

The government also has the ability to exercise control over which crew members can serve aboard the S/S MAJ. STEPHEN W. PLESS. Unlike a typical time charterer that simply hires a vessel to transport cargo, and does not dictate to the vessel owner what crew members will be authorized to serve aboard the ship, the United States Government requires that the master, chief officer, and radio officer who will work aboard the S/S MAJ. STEPHEN W. PLESS must be qualified for a United States Government "secret" security clearance, and all other officers must be qualified for a United States Government "confidential" security clearance. Additionally, the United States requires that all crew members who will serve aboard the S/S MAJ. STEPHEN W. PLESS must be United States citizens. *See*, Affidavit of Peter M. Johnston at paragraph 7. This type of crew control exercised by the United States extends beyond the normal "hire a boat and tell it where to deliver the cargo" time charter situation.

Extending its operational control beyond simple directions of what cargo should be transported and to what port the cargo should be delivered, the United States controls when the S/S MAJ. STEPHEN W. PLESS is entitled to refuel, and where the source of the fuel will be. See, Affidavit of Peter M. Johnston at paragraph 16. A typical time charterer does not concern itself with issues of when or where the vessel being hired to transport cargo will refuel. The government, exerts operational control over the S/S MAJ. STEPHEN W. PLESS by being able to restrict when and where the vessel can refuel itself.

In a normal time charter situation, the time charterer that has hired the vessel to deliver cargo has no inherent right to select husbanding agents at overseas ports. In the

case of the S/S MAJ. STEPHEN W. PLESS, however, the United States Government has asserted the right to disapprove any proposed husbanding agents at overseas ports. See, Affidavit of Peter M. Johnston at paragraph 17. By limiting the right of Waterman Steamship Corporation to select its own husbanding agents, the Military Sealift Command has exercised operational control over the S/S MAJ. STEPHEN W. PLESS that extends far beyond that of a typical time charter party.

A normal time charterer has the right to direct what cargo will be carried, and to which port the cargo will be delivered, but does not have the right to assign its own personnel to work aboard the vessel. In the case of the S/S MAJ. STEPHEN W. PLESS, however, the United States Government has asserted the right to assign military personnel in the employ of the United States Armed Forces to board the vessel and to load, stow, and maintain explosives that the S/S MAJ. STEPHEN W. PLESS carries as a part of its function as a preposition supply ship subject to the orders of the Military Sealift Command. See, Affidavit of Peter M. Johnston at paragraphs 3 and 19. Additionally, the government has the right to assign security forces that are part of the United States military to work aboard the vessel. See, Affidavit of Peter M. Johnston at paragraph 27.

Unlike a typical time charter arrangement where the cargo owner simply hires the vessel to transport cargo from one place to another, the United States Government requires that the S/S MAJ. STEPHEN W. PLESS be operated and maintained accordingly to highly detailed and specific standards promulgated by the Military Sealift Command. See, Affidavit of Peter M. Johnston at paragraph 25. These standards affect minute operational details including operation of refrigeration units such as the one in which Herbert

Anderson allegedly was injured. For example, an inspection conducted by the COMPSRON ONE engineering/material officer on August 6, 1996 observed that in the refrigeration room, the reefer strainer valve is weeping seawater and corroding deck beneath. Requires rework and preservation. " See, Affidavit of Peter M. Johnston at paragraph 25. Typical time charterers do not concern themselves with whether a deck in a refrigerator on a time chartered vessel may be corroding; a typical time charterer is concerned only with getting cargo safely delivered from one port to the next.

The S/S MAJ. STEPHEN W. PLESS "is subject to a variety of operational controls imposed by the MSC Commodore." *See, Affidavit of Peter M. Johnston at paragraph 26.* Plaintiff has not introduced any evidence rebutting the operational control that is, in fact, exercised by the Military Sealift Command. Instead, plaintiff has argued that because the charter party is labeled a "time charter" party, therefore, ipso facto, the government does not exercise the requisite operational control to subject it to liability. Once again, the plaintiff's analysis is hollow. As was observed in *Burkholder I,* 56 F.Supp. at 109, "[T]he mere fact that the charter calls itself a time charter... does not conclusively determine its character, " *Burkholder I,* 56 F.Supp. at 108. The key issue is not the label given to the charter party, but the degree of operational control in fact exercised by the United States of America. Williams, 874 F.2d at 1062; *Favorite v. Marine Personnel and Provisioning, Inc.*, 955 F.2d 382, 387 (5" Cir. 1992). The affidavit of Peter M. Johnston adequately demonstrates the degree of operational control that the Military Sealift Command exercises over the S/S MAJ. STEPHEN W. PLESS. Plaintiff has not challenged any of the factual statements set forth in Mr. Johnston's affidavit.

CONCLUSION

Liability on the part of the United States is triggered in this case by virtue of the operational control the United States exercises over the S/S/ MAJ. STEPHEN W. PLESS, which subjects the United States to in personam liability notwithstanding the fact that the charter party is labeled a "time charter". Additionally, an *in personam* remedy against the United States is substituted for claims of unseaworthiness and maintenance and cure that would otherwise give rise to *in rem* liability with the attendant right to seize a vessel that carries munitions for the Military Sealift Command. Once liability on the part of the United States has attached, whether by virtue of its operational control that subjects it to liability for Jones Act negligence, or by virtue of claims having been asserted that could give rise to *in rem* liability on the part of the S/S MAJ. STEPHEN W. PLESS, the *in personam* liability of the United States of America is exclusive in place of any liability on the part of the operator of the vessel. See, 46 USC §745.

Plaintiff has sued the wrong party. His claims should be directed against the United States of America, and should be brought in federal district court.

WHEREFORE, the Exception of No Right of Action or No Cause of Action should be SUSTAINED, or, alternatively, summary judgment should be GRANTED.

NEW ORLEANS, LOUISIANA, this 8th day of July 1999.

Respectfully submitted:

/s/ John R. Fitzgerald
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 8th day of July, 1999 served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first clasws postage prepaid.

/s/ John Fitzgerald

APPENDIX 5

44056/JRF/lrnr 0032-5573

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS STATE OF LOUISIANA

NO.: 97-07697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, came and personally appeared,

PETER M. JOHNSTON,

who, after being administered an oath, did testify as follows:

1. I am the Vice President of Operations for Waterman Steamship Corporation.

2. I have personal knowledge of the matters set forth herein.

3. The steamship MAJOR STEPHEN PLESS, upon which Herbert Anderson contends he was injured, is operated exclusively for and on behalf of the United States Government, Department of Defense as a pre-positioned supply ship that is subject to the orders of the Military Sealift Command (MSC). T'he vessel is used to carry ammunition and equipment for support of a specially organized Marine Amphibious Brigade (MAB) to enhance rapid deployment of the United States Marine forces.

4. The cargo carried by the MAJOR STEPHEN PLESS is exclusively military,

5. The MAJOR STEPHEN PLESS is an Afloat Prepositioning Force ("APF") ship.

6. The United States Government has the right to install on the MAJOR STEPHEN PLESS any defensive armament (including demagnetization by installed equipment or other process) the Government deems necessary.

7. The Government requires that the master, chief officer, and radio officer must be qualified for a United States Government "Secret" security clearance. All officers must be qualified for a United States Government "Confidential" security clearance. In addition, all of the crew members of the MAJOR STEPHEN PLESS and all officers must be United States citizens.

8. At the time of the alleged accident on May 1, 1996, the MAJOR STEPHEN was operating on behalf of the Military Sealift Command off the Coast of Spain.

9. Days during which the MAJOR STEPHEN PLESS is in foreign ports is counted as time used by a military ship pursuant to applicable Status of Forces agreements to the same extent that time is counted while an aircraft carrier or destroyer is in a foreign port. In other words, if the United States Government has negotiated permission to use a foreign port for its military vessels for 100 days per year, a day at which the MAJOR STEPHEN PLESS is in the foreign port counts against that total to the same extent as would any United States naval warship.

10. The Commander of Military, Sealift Command (COMSC) has promulgated MSC Force Operating and Administrative Instructions that are applicable to the prepositioned supply ship MAJOR STEPHEN PLESS pursuant to COMSC Instruction 3121-9.

11. The Standard Operating Manual (SOM) promulgated by the MSC pursuant to COMSC Instruction 3121.9 reflects that COMSC duties and responsibilities, as specified by the Chief of Naval Operations (CNO) include the duty to "operate and administer government-owned ships assigned, and all other ships acquired for the purpose of providing ocean transportation (sealift) services for the movement of personnel, materialsi and petroleum, oil, and lubricants (POL)."

12. The SOM promulgated by the COMSC mandates that "All ships in the service of MSC, whether U.S. Government-owned, are boat chartered, time or voyage-chartered, are in exclusive government non-commercial service. Each of these ships is entitled to full soverign immunity." The SOM further mandates that "This means such ships are, *inter alia*, immune from arrest and search,

whether in foreign internal or territorial waters or on the high seas; immune from all foreign taxation; exempt from any foreign state regulation requiring flying the flag of such foreign state either in its ports or while passing through its territorial sea; and entitled to exclusive control over persons on board such ships with respect to acts performed on board."

13. Sailing orders for the MAJOR STEPHEN PLESS are issued by the MSC. An example of sailing oders that the MSC has issued to the MAJOR STEPHEN PLESS are attached hereto.

14. The Military Sealift Command exercises operational control over the MAJOR STEPHEN PLESS in a number of ways.

15. Sailing orders for the MAJOR STEPHEN PLESS are issued by the Commander of the Maritime Prepositioning Ships, Squadron 1.

16. The MSC issues orders instructing when the vessel will be refueled and where the source of the fuel will be.

17. The United States Government has the right to disapprove any proposed husbanding agents at overseas ports.

18. Overhaul, drydocking, and repairs to the MAJOR STEPHEN PLESS involving an expenditure of more than $50,000.00 are not made unless approved in advance by the MSC.

19. The United States Governent has the right to assign military personnel in the employ of the United States Armed Forces aboard the vessel to load, stow, and maintain explosives.

20. The MSC arranges for port clearances at all foreign ports.

21. The MSC often orders that the MAJOR STEPHEN PLESS go out on convoys with military units and participate in military exercises.

22. The MSC frequently orders that military personnel be placed aboard the MAJOR STEPHEN PLESS.

23. Security forces that are part of the United States Military are very often assigned to work aboard the vessel.

24. The MAJOR STEPHEN PLESS is listed in Jane's Fighting Ships in the category of the Military Sealift Command.

25. The MSC Commodore, a Navy captain who is the on-scene MSC representative, regularly inspects the MAJOR STEPHEN PLESS to ensure that the vessel is being operated and maintained according to standards promulgated by the MSC. A sample Informal Material Inspection ("IMI") demonstrating the extent of the MSC's operational control ("OPCON") of the MAJOR STEPHEN PLESS is attached hereto. The IMI, conducted 06 August 1996 while at anchor in Souda, GR, was conducted by the COMPSRON ONE engineering/material officer, who observed that discrepancies have been corrected in the top side electrical and

Q. 1. Aviation Facility flight deck light sequencer electrical box, preservation work was completed in the bulkhead of the engine room upper level port side aft, but that, in the refrigerator rooms, the "reefer strainer valve is weeping sea water and corroding deck beneath. Requires rework and preservation."

26. Unlike private commercial operations where a vessel is merely instructed to carry cargo from one port to another, the MAJOR STEPHEN PLESS is subject to a variety of operational controls imposed by the MSC Commodore.

FURTHER YOUR AFFLANT SAYETH NOT.

/s/ Peter M. Johnson
PETER M. JOHNSON

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 2nd DAY OF December, 1998.

/s/ Robert B. Azouls, III
NOTARY PUBLIC

P. SECURITY (All entries must be completed)

1. TYPE OF STORAGE CONTAINER USED (Check One)

(X) a. Steel safe cabinet fitted with a three-number combination lock.

( ) b. Steel cabinet secured by a steel bar and a three-numer combination padlock.

( ) c. Non of the above (If this safe is checked, and care type of locking source, manner on which contractor is opened and secured and other information keemed appropriate.)

2. MANUFACTURERS NAME AND NUMBER OF THE SAFE OR PADLOCK (If available)

MOSLER GSA APPROVED

3. SIZE OF CONTAINER (Height, width, depth)

12" X 16" X 20"

4. INDICATE PLACE WHERE SECURITY CONTAINER IS LOCATED

SECURE COMM CENTER

( ) MOST SHIPBOARD PERSONNEL HAVE FREE ACCESS TO THIS AREA.

(X) SHIPBOARD PERSONNEL ARE RESTRICTED FROM THIS AREA

5. LIST NAMES AND BALLETS OF ALL PERSONNEL HAVING ACCESS TO CONTENTS OF CONTAINER

Walter E. Shea, Chief Mate
James F. Ronan, Radio Operator

REMARKS (Cor. recommened)(Identify by stem designator, e.g., A.I.)

6. MATERIAL CONDITION OF SECURITY CONTAINER	yes	no
a. All drawers operate smoothly	X	
b. All drawers remain firmly secure when safe is locked (secure safe and attempt to open)	X	
c. Interior of safe contain a fire resistant material(i.e., asbestos, cement)	X	
d. Physicial appearance of safe indicates measure of maltreatment		X
e. Because of container's size and weight, is at portable (i.e. able to be easly moved from its present location)		X
f. Has custodian had any problems concerning opening and securing safe which would indicate some type of physicial malfunction (If yes, has corrective action been installed and help?)(Explain on "Remarks"below.)		X
7. WHEN OPEN (and classified material is not) IS SECURITY CONTAINER KEPT UNDER CONSTANT SURVEILLANCE?	X	
8. IS THE COMBINATION TO THE SECURITY CONTAINER CHANGED AT LEAST ONCE A YEAR ALSO EACH TIME THERE IS A CHANGE OF CUSTODIAN?	X	
9. DOES THE COMPLAINT HEADQUARTERS PROMULGATE INFORMATION CONCERNING REQUIRED SECURITY PRACTICES AND PROCEDURES GOVERNING THE STORAGE AND HANDLING ÔF CLASSIFIED MATERIAL?(If yes, how is this done?)(explain on "Remarks" below.)	X	

Q. Miscellaneous	
ITEM	**Condition**
1. Aviation Faculity	S
2. Portable water tanks	NI
3. Bunker tanks	NI
4. Feedwater tanks	NI
5. Cordage or cargo space aft	S
GENERAL CONDITION OF SHIP	**S**

INFORMAL MATERIAL INSPECTION
SS MAJ STEPHEN W PLESS

An informal material inspection of the SS Pless was conducted o6 Aug 1996 while at anchor in Souda, GR. The inspection was conducted by the COMPSRON ONE Engineering/Material Officer. SS Pless is scheduled to complete its 30 month MPF Maintenance Cycle (MMC-5) in spring 1997. Work packages have been submitted for jobs to be done during shipyard overhaul. Overall the ship is in satisfactory condition.

The following discrepancies have been corrected since the last report (items corrected on last report have been deleted):

A.14 TOPSIDE ELECTRIACAL and Q.1 AVIATION FACILITY. Flight Deck Light Sequencer Electrical Box mounted under the flight deck has been protected with preservative paint used around pump foundations in engineering spaces. Appears to have stopped corrosion issue.

F.I. ENGINE ROOM. Preservation work has been completed on overhead and bulkheads of Engine Room upper level port side aft.

The following items are still applicable since last inspection:

B.1. SHIP SIDES. Running rust beneath exhaust plenums indicates possible corrosion within plenums. Scheduled for overhaul in MMC-5.

Q.5- CORDAGE/ DUNNAGE. While back-loading causeway sections following NSE training in March 96, a hole was punctured in bottom of CSP 69-163 by a steel padeye on dunnage used between causeway sections. BEACH GROUP repaired causeway section, however recommend removing/ relocating lifting padeyes on dunnage to prevent similar problems in the future. Recommend consulting cargo handlers from CRAP GROUP for acceptable modifications.

The following items are additions since last Inspection:

A.4 RAILS. Ship's force has identified and marked various corroded topside rails to be replaced as part of MMC-5 work package.

A.5 DECK FITTINGS.Remote valve operators for fire damper and DFM valves port side aft require preservation. Starboard anchor washdown valve in forecastle requires preservation.

E.8 REFRIGERATOR ROOMS. Reefer strainer valve is weeping seawater and corroding deck beneath. Requires rework and preservation.

F. ENGINEERING SPACES. Excellent preservation in Engine Room. Last area to be completed is after bulkhead, which is primed with paintingion progress.

H.I BOILERS. DC Heater Relief Valve in uptake space has lifted in past and requires preservation due to escaping steam corrosion.

P.9 SECURITY. Information regarding COMSEC handling is delineated and distributed via COMP-SRON instruction.

N.3 and 4 PUBLICATIONS. Editions held: NTP-10C (10D is in affect), and NWP-14D.

Cooperation afforded the inspector during the inspection was out-standing and greatly appreciated.

Signature
illegible

TITLE
COMMANDER, MPSRON
ONE

INFORMAL MATERIAL INSPECTION
C FORM 4738/3 (Rev. 6-78)

(Name of Command)	To:		Date & Time of Inspection
COMPSRON	**Comsc. Wash.DC**		**06Aug96/0830**
Name of Ship SS MAJ STEP. W. PLESS	Location Souda Gr	Date of Last Overhaul AUG 94	Date of Report 15Aug96

INSTRUCTIONS

1. Use the following designations in 'CONDITION' column: E--Excellent: S--Satisfactory: U--Unsatisfactory.

2. Alongside U--ratings indicate corrective action to be taken by using the terms SF--for ships force: R--for urgent items to be included in requests for voyage repairs of requisitions for supplies: and D--for non-urgent items be corrected at the next overhaul or repair period. Example U--SF

3. Use NA--for not applicable: NI--for not Inspected.

4. Use backs of form for comments(particularly on items marked U) recommendations, suggestions, improved conditions noted, ect.

DISTRIBUTION: Original and one copy to COMSC; one copy to contract operator; one copy to MSC area commander in which inspection performed; one copy to Inspector's file; one copy to tanker before leaving port if possible. A letter of transmittal is not required.

NOTE: This report represents the material condition as found by visual inspection, and information from ship's officers when deficiencies other

This form may be completed by typewriter or manually

A. TOPSIDE	
ITEM	**Condition**
1. Main deck	S
2. All other weather and outside decks	S
3. Catwalks	S
4. Bulwarks, rails, lifelines	S
5. Deck fittings	S
6. Deck winches and capstans	S
7. Anchor windlass, anchors, chains	S
8. Booms and rigging	S
9. Cargo piping	S
10. Stream piping (lagging not req'd accept adjacent to machinery)	S
11. Accommodation ladder and gangway	S
12. Ladders	S
13. Superstructures and houses (exterior)	S
14. Electrical cable (exposed)	S

B. SHIP SIDES	Condition
1. Hull exterior	S
a. Paint	S
b. Indentations	S
C. FORWARD STORAGE	**Condition**
1. Lockers	E
2. Paint Locker	S
3. Dry cargo locker	E
4. Chain locker	NI
D. AMOIDSHIP HOUSE	
1. Passageways	E
2. Living Spaces	E
3. Wheel house	E
4. Chart room	E
5. Radio room	E
6. Ships office	E
7. Lounge	E
8. Wash rooms	E
9. Hospital	E
10. Shelter deck area	E

E. AFTER HOUSE	Condition
1. Passageways	E
2. Living spaces	E
3. Dining rooms	E
4. Crew lounge	E
5. Wash rooms	E
6. Galley	E
7. Pantry	E
8. Refrigeration rooms	S
9. Steward store rooms and spaces	E
10. laundry	E
F. ENGINEERING SPACES	
1 . Engine room	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
2. Boiler rooms	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
3. Feed pump room	E
a. Gratings, ladders, floor plates	E
b. Bildges	S
4. Store rooms. machine shop, etc.	E
5. Shaft alley	E
6. Steering gear flat	E
7. Emergency diesel generator room	E
G. PUMP ROOMS	
1. Fwd cargo pump room	S

	Condition
a. General cleanliness and appearance	S
b. Gratings, ladders, floor plates	S
c. Bildges	S
2. Aft cargo pump room	S
a. General cleanliness and appearance	S
b. Gratings, ladders, floor plates	S
c. Bildges	S
H. MACHINERY & EQUIPMENT	
1. Boilers - main, auidliary, waste heat	S
2. Copdensers	S
3. Evaporators	S
4. S. S. generators	S
5. Shaft driven generatur	S
6. Main lurlinols)	S
7. Muin diesel engines	NA
8. Feed pumps	S
9. Cargo pumps	S
10. Stripping pumps	S
11. Circulating pumps	S
12. Eductors	S
13. Propeller	N I
14. Propeller shafting	E
15, Tank cleaning machines (note number aboard, condition of each)	NA
16. Heaters	NA
17. Coppus blowers	S
18. Adequacy of spare parts	E
19. Machinery history (upt4~date)	S

I. SAFETY FEATURES	Condition
1 . Watertight loors	E
2. Fire extinguishers	E
3. Fire hoses, nozzles, and axes	S
4. Fire mains	S
5. Fire &- bilge pumps	S
6. Steam smothering system	S
7. C02 equipment	E
8. Lifeboats, davits, falls, and ladders	S
9. Life preservers and life ring buoys	S
10. Rescue breathing apparatus	E
11. Helmets	E
12. No bafety hazards	E
13. Safety signs and warnings	E
J. CARGO TANKS	
I . Scale condition	NI
2. Coating condition	NI
3. Piping	S
4. Cargo valves, reach rods, and wheels	S
5. Cargo venting sy-stern	S
6. Heating coils	NA
7. Ladders	NI
K. FURELING AT SEA STATIONS	
I . Hoses, quick release couplings, quick closing valves	E
2. Telephone head sets, portable electric megaphone	E
3. F enders	S

L. COMMUNICATIONS	Condition
I . Radio transmitter, receivor, auto alarm	E
2. Radioaitenna system	E
3. Intercommunication system	E
4. Adequacy of spare parts	E
M. NAVIGATION	
1. Fathometer	E
2. Compasses	E
3. Radar	S
4. Loran	E
5. Radio detection finder	E
7. Adequacy of spare parts	E
N. PUBLICATIONS	
1 . TANKOPINS (Edition held)	NA
2. NTP-9 (Edition, held)	NA
3. NTP- IOB (Edition held)	S
4. NWP - 14 (Edition held)	S
5. Any 5 other pubs, req'd by COMSCINST 3121.3	S
6. Envelope 'ALFA'	NA
O. PERSONNEL	
1. Appearance & conduct	E
2. Cooperation between departments	E
3. Cooperation in assisting with this inspection	E

49614041 WACOR UD
NCS SDN

2468
1251 09/13 24682168 NCSX2609
00907

HSG 907
P R 131232Z SEP 95
TO RUWMUA/MV 2ND LT JOHN P BOBO
RUWMBUA/SS MAJ STEPHEN W PLESS
INFO RHDLCNE/CINCUSNAVEUR LONDON UK//113/
RULSMSC/COMSC WASHINGTON DC//N3//
RUFRQJQ/COMSIXTHELT
RULYVBA/COMSECONDFLT
RUCKMAC/RUCBLFA/COMMARFOREUR//G3/G4//
RUCKMAA/RUCBLFA/COMMARFORLANT//G3/G4//
RUCKMEA/CG 11 MEF//G3/G4/G8//
RUOOVKA/RULYGOA/COMPHIBGRU Two
RUCBFDI/COMNAVBEACHGRU TWO
RHDLPEA/COMSCEUR LONDON UK//N3//
RHDLPGJ/CYF SIX THREE
RHCFMCC/COMPSRON ONE
RUWMBUA/ISS SGT MATEJ KOCAK
RUWMBUA/SS PFC EUGENE A OBREGON
RUWMBUA/NAVCOMTELSTA INMARSAT TERM
SAN DIEGO CA/WATERMAN
STEAMSHIP CORP NEW ORLEANS LA/TLX
49614041//
AMERICAN OVERSEAS MARINE CORP QUIN-
CY MA/TLX
6731749//
BT
UNCLAS //N03000//

USGID/ORDER/CTG SIX THREE PT EIGHT//
ORDTYP/OTR//
AMPN/SAILORD//
TIMEZONE/L//
AMPN/ALL TIMES LOCAL UNLESS OTHERWISE DIRECTED//
GENTEXT/EXECUTION/1. ON 18 SEP. MV BOBO/SS PLESS GET UNDERWAY FROM
POTHUAU, FR AND TRANSIT TO SOUDA BAY. G.R TO ARRIVE 21 SEP.
2. SUBBMIT MOVREP, DAILY POSITION REPORT, FUEL REPORTS- WEAX OBSERVATIONS AS REQUIRED.
3. DIP CLNC IS PENDING. WILL ADVISE WHEN APPROVED.
4. MV BOBO AND SS PLESS ACKNOWLED)GE RECEIPT OF THIS MESSAGE.//
BT
NC3 SDN

49614041 WACOR UD
ZHR UUUUU
P 130816Z SEP 95
FM SS MAJ STEPHEN W PLESS
TO COMSCMED HAPLES IT
INFO COMPSR0N ONE
MV 2ND LT JOHN P. BOBO
BT
UNCLAS/H00000
SUBJ/SAILORD//
AMKS/1. REQ. SAILORSBE PROVIl ED ASAP TO SS PLESS AND MV BOBO
FOR NEXT SCHEDULED MOVEMENT.
BT

WSC Inbound

From: mhslwu/0 TLX-originator
To: WSCIN
Subject: 49614041 WACOR UD
Date: 18 of November,1996 14:28

49614041 WACOR UD
NCS SDN

7178
0923 11/18 25057372 NCSX7182
0035296

MSG 35296
P 181240Z NOV 96
FM COMPSRON ONE
TO RUWMBUA/SS STEPHEN W PLESS
RUWMBUA/SS PFC EUG
ZEN/MV 2ND LT JOHN P BOBO
INFO RUFRQJQ/COMSIXTHFLT
RULSMSCICOMSC WASHINGTON DC//PM3/PM31
/PM31 1
RUCKMACICOMMARFOREUR
RUFGFMC/HQ MARFOREUR BOEBLINGEN GEI/G3//
RHDLPGJ/CTF SIX THREE
RHDLPEA/COMSCEUR LONDON UK//N3/1
RHDLPGK/COMSCMED NAPLES IT//N3//
RHDLPUV/NAVSTA ROTA SP//PORTI/
RUWMBUA/SS SGT MATEJ KOCAK
RULSRMA/MV AMERICAN MERLIN
RUWMBUA/NAVCOMTELSTA INMARSAT TERM SAN
DIEGO CA

WATERMAN STEAMSHIP CORP NEW ORLEANS LA/[TLX 49614041//
RUWMBUA/AMSEA QUINCY MA
BT
UNCLASHN/03000//
MSGID/ORDER/COMPSRON ONE/0359/NOV//
ORDTYP/OTR//
AMPN/SAILORD//
TIMEZONE/L//
AMPN/ALL TIMES LOCAL UNLESS OTHERWISE INDICATED//
GENTEXTIEXECUTION//
RMKS11. SS PLESS DEPART SOUDA BAY , GR 23NOV96 FOR PARTICIPATION
IN EXER NIRIIS 96. UPON COMPLETION OF EXER , PROCEED ENR SOUDA
BAY, GR TO ARR 25NOV96. SUBMIT MOVREP, PREREP, DAILY 0800
POSITION/FUEL REPORTS AND WEAX REPORTS IAW MED OPERATING PROCEDURE.
2. SS OBREGON/MV BOBO DEPART ROTA, SP 02DEC96 AND PROCEED ENR
BARCELONA, SP TO ARR 05DEC96. COMPSRON ONE WILL SUBMIT MOVREP AND
LOGREQ FOR BOTH VESSELS. MV BOBO SUBMIT WEAX REPORTS. SS
OBREGON/MV BOBO SUBMIT DAILY 0800 POSITION REPORTS. SS
3. COMPSRON ONE WILL ADVISE UPON APPROVAL
OF DIPLOMATIC CLEARANCE.
4. SS PLESS/SS OBREGON ACKNOWLEDGE RECEIPT
OF THIS SAILORD.//
BT
NCS SDN
49614041 WACOR UD

APPENDIX 6

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

Filed APR 30 '97

N 0.: 97-7697 DIVISION "F"

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED:_____ _____
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel plaintiff, Herbert Anderson, a person of the full age of majority, a resident and domiciliary of the Parish of Orleans, State of Louisiana, respectfully represent,:

I.

Made defendant herein is Waterman Steamship Corporation, a foreign corporation, authorized to do and/or actually doing business in the Parish of Orleans, State of Louisiana, and within the jurisdiction and venue of this Honorable court.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was employed by defendant, Waterman Steamship Corporation, as a Seaman and Assistant Cook Utility of the crew and permanently assigned to a vessel or fleet of vessels in navigation that were owned and operated by defendant, Waterman Steamship Corporation, which vessels include the S.S. MAJ. STEPHEN W. PLESS.

III.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was engaged in the course and scope of his employment aboard the MAJ. STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

IV.

On or about May 1, 1996, petitioner was caused by defendant to sustain injuries to his psyche and body as a result of the negligent acts of defendant, and its agents, servants, employees, and the unseaworthiness of the vessels under its custody and control.

V.

On or about May 1, 1996, petitioner, while employed as an Assistant Cook Utility aboard the S. S. MAJ. STEPHEN W. PLESS, was working in the meat box of the galley with the steward when he was caused to trip, slip or otherwise fall over an object on the floor and into a rack or shelf in the galley.

VI.

As a result of the foregoing accident, petitioner was caused to sustain injury to his shoulder and back, including but not limited to, a disc injury and possible tendon perforation of the right shoulder, as well as other parts of his body, the full residuals of such injuries are unknown but severe.

VII.

Following the accident, defendant paid petitioner maintenance and cure benefits for a period of time. However, defendant terminated payment of those benefits without lawful authority and despite demand, has arbitrarily and capriciously failed and/or refused to reinstate payment of plaintiff's maintenance and cure benefits.

VIII.

Pursuant to the subject matter of this lawsuit as set forth herein, defendant is liable to petitioners as follows:

IX.

COUNT ONE

The aforesaid injuries to the petitioner were directly and proximately caused by the negligent acts of commission and/or omission on the part of defendant, Waterman Steamship Corporation including, but not limited to, defendant's failure to provide petitioner, as its employee, with a reasonably safe place to work, and failure to assign petitioner to a seaworthy vessel or fleet of vessels, its failure to warn petitioner of impending dangerous perils, its failure to

provide petitioner with sufficient assistance form crewmembers which would have enabled him to perform his assigned work with a reasonable degree of safety, failure of its superior officers to supervise or to be attentive with respect to the operation underway at the time petitioner was injured, and other negligent acts of commission and/or omission as will be shown at the trial of this matter.

X.

SECOND COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally, and/or in the alternative, alleges that defendant, Waterman Steamship Corporation, is liable to petitioner under the General Maritime Law for breach of the warranty of seaworthiness, extending to the vessel or vessels involved herein, including but not limited to, the S.S. MAJ. STEPHEN W. PLESS. The aforesaid injuries suffered by the petitioner were also directly and proximately caused by the unseaworthiness of the defendant's vessels, including but not limited to, the defendant subjecting petitioner to injury as a result of an inadequate and/or incompetent crew and its failure to furnish the tools, co-workers, or equipment necessary for petitioner to perform his duties in a reasonably safe manner, all which caused the injuries sustained by petitioner.

XI.

THIRD COUNT

In addition, petitioner, while reiterating and realleging each and every allegation made hereinabove, alleges that

he was injured performing work as a Seaman and as a member of the crew of a vessel and/or vessels in the employment of Waterman Steamship Corporation, and sustained the injuries complained of in the service of the vessel and/or vessels, so as to be entitled to maintenance and cure, both past and future, until such time as he in fact reaches maximum cure, as well as entitlement to damages and attorney's fees for defendant's arbitrary and capricious termination of his maintenance and cure.

XII.

FOURTH COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove additionally alleges that as a result of defendant's refusal to provide maintenance and cure, petitioner's injuries have worsened, his ultimate physical recovery has been delayed, and he has been caused to suffer pain and mental anguish that he oterwise would not have incurred.

XIII.

As a direct result of the aforesaid incident and the negligence of the defendant, Waterman Steamship Corporation, as well as the unseaworthiness of the defendant's vessels and defendant's refusal to furnish maintenance and cure to petitioner, Herbert Anderson, has suffered severe physical pain and keen mental anguish, has undergone medical treatment, has lost substantial sums of money he otherwise would have earned, has been disabled from and/or severely handicapped in his pursuit of gainful employment and other daily activities, and these conditions may

continue, worsen, or become permanent in time, and the full residuals may be severe; all of which entitles petitioner to all damages which are reasonable under the circumstances for past, present, and future pain, suffering and mental anguish; disability; past and future loss of wages, including impairment of earning capacity; past and future medical expenses, past and future maintenance, and lost of life's pleasures. Petitioner's claims exceed the requisite amount for this court's subject matter jurisdiction.

XIV.

Petitioner's injuries and resulting damages were legally and proximately caused by the fault, including the negligence, of the defendant, its officers, agents, employees, and those for whom it is legally responsible, as well as by reason of the unseaworthiness of the S. S. NLAJ. STEPHEN W. PLESS. The claims against defendant are asserted by petitioner as a seaman under the Jones Act, 46 U.S.C. § 688, under the substantive provisions of the general maritime law of the United States, including the warranty of seaworthiness, which has been breached by defendant herein, and under any other federal or state statute which may be applicable. The jurisdiction of this court is premised on the "savings to suitors" clause. In the alternative, and only in the alternative, that petitioner is held not to be a seaman within the meaning of the Jones Act, petitioner alleges that he is entitled to recover from defendant for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act and/or the law of the State of Louisiana.

XV.

Petitioner prays that he be declared a Seaman by this court.

XVI.

Petitioner is entitled to and prays for a trial by jury.

WHEREFORE, petitioner, Herbert Anderson, respectfully prays that defendant be served with a copy of this petition and be duly cited to appear and to answer, and that, after legal delays and due proceedings had, there be judgment herein in favor of petitioner, Herbert Anderson, and against defendant, Waterman Steamship Corporation, for all damages as are reasonable under the premises. Petitioner additionally prays for such amounts as the court may deem fit for continuing maintenance and cure payments and attorney's fees and petitioner further prays for legal interest on all said amounts, including pre-judgment interest, until paid in full, as well as for the full costs and disbursement of these proceedings, and all general and equitable relief as the court may deem appropriate herein.

Respectfully submitted,

GAINSBURGH, BENJAMIN, DAVID MEUNIER, NORIEA AND WAR SHAUER

BY: /s/ Jeffrey A. Mitchell
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JEFFREY A. MITCHELL, #19711
2800 Energy Centre
1100 Poydras Street
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PLEASE SERVE:

Waterman Steamship Corporation
through its agent for the service of process
George Denegre
201 St. Charles Avenue
50th Floor
New Orleans, LA 70170